MCH91-33-4-9

MEMORANDUM

To: Zola Skweyiya, Department of Legal and Constitutional Affairs
From: Heinz Klug
Re: Research on Affirmative Action
Date: April 1990

A... Africa: A p...

Letter: Arrived as I was leaving. Looks v. interesting. Will read a reply when I return - probably late ~~Apr~~ May.

...rall failure o... ...ss the long a... ...r to make any s... ...between blacks a... ...y aspect of A... ...e weaknesses of the dominant approach[1] to affirmative action in the U.S. and to adopt for ourselves a formulation of affirmative action that will provide the necessary framework for achieving equal participation for all citizens of a non-racial, democratic South Africa.

The following analysis is aimed at providing a preliminary basis upon which to develop such a formulation. The first section analyzes the constitutional guarantee of equality and the role of

---

[1] The problems of attempting to apply the dominant U.S. approach to affirmative action in the South African context is best described in a recent article published in South Africa, See, Maphai, Affirmative Action in South Africa -- A Genuine Option?, 15(2) Social Dynamics 1 (1989).

MC H91-33-4-9

MEMORANDUM

To: Zola Skweyiya, Department of Legal and Constitutional Affairs
From: Heinz Klug
Re: Research on Affirmative Action
Date: April 1990

Affirmative Action in a non-racial democratic South Africa: A preliminary examination

Given a history of partial success and the overall failure of affirmative action in the United States to redress the long and tragic social history of racism and in particular to make any significant impact on the fundamental inequalities between blacks and whites which continue to permeate virtually every aspect of American life, it is important that we understand the weaknesses of the dominant approach[1] to affirmative action in the U.S. and to adopt for ourselves a formulation of affirmative action that will provide the necessary framework for achieving equal participation for all citizens of a non-racial, democratic South Africa.

The following analysis is aimed at providing a preliminary basis upon which to develop such a formulation. The first section analyzes the constitutional guarantee of equality and the role of

---

[1] The problems of attempting to apply the dominant U.S. approach to affirmative action in the South African context is best described in a recent article published in South Africa, See, Maphai, Affirmative Action in South Africa -- A Genuine Option?, 15(2) Social Dynamics 1 (1989).

anti-discrimination measures in its achievement. The second section considers the issue of affirmative action in relation to issues of equality and discrimination. Finally a limited consideration is given to the mechanisms that may be required to implement an affirmative action programme.

I. Will all South Africans be equal in a new South Africa?

Apartheid is by definition a form of social organization premised on inequality. The struggle against apartheid is by contrast premised on the promise of a future South Africa in which all people enjoy equal rights and opportunities.

A. Guarantees of equality in the ANC Constitutional Guidelines and the Freedom Charter.

The ANC Constitutional Guidelines reiterate the ANC's vision of a future South Africa premised on equality. The Guidelines however are specifically limited in their scope and do not claim to provide more than a framework in which the ANC is encouraging popular debate and participation in the formulation of a future constitution for South Africa.

However, reading the Guidelines together with the Freedom Charter, which is incorporated into the Constitutional Guidelines as the basis of a future bill of rights, the proposed constitutional framework guarantees both formal equality and a constitutional vision of collective action to overcome South Africa's legacy of racial domination and inequality. It is this second aspect which assumes a wider interpretation of the notion of equality and provides the basis of the proposed constitutional

duty to actively eradicate "the economic and social inequalities produced by racial discrimination."

B. The abolition of apartheid and the establishment of formal equality

Integral to all conceptions of a non-racial democratic South Africa is the abolition of all apartheid legislation and the creation of conditions of formal equality. Both the Freedom Charter and the Constitutional Guidelines provide for formal equality in the guarantee of "equal rights for all individuals irrespective of race, colour, sex or creed."

Equal political rights and the establishment of democratic organs of government in a unitary South Africa together with the protection of the fundamental human rights of all citizens will provide the basis for formal equality. However, for equality to be formal in more then words alone requires that each citizen's formal equality before the law and in the society translates into equal treatment at the hands of those in positions of power and authority.

Equal treatment requires that similar situations be treated similarly,[2] that every citizen has a right to an equal distribution of opportunities, resources or obligations.[3] For this to become a reality in South Africa it will be necessary to look beyond the mere abolition of apartheid legislation. Even full political rights will not guarantee equal treatment so long

---

[2] H.C. Black, **Black's Law Dictionary** 481 (5th ed. 1979).

[3] R. Dworkin, **Taking Rights Seriously** 227 (1977).

as black South Africans must deal with a predominantly white civil service and judiciary whose treatment of the black community has been anything but equal.

In the private sphere, where whites control the vast majority of managerial and supervisory positions, equal treatment is premised on the future breakdown of racist attitudes in the white community. The possibility of achieving equal treatment is further complicated by the effects of centuries of racial domination and inequality on oppressed communities and individuals. In the quest for equal treatment mechanisms will need to be established through which individuals may lodge complaints of discrimination.

Anti-discrimination legislation providing for private causes of action in the courts will be inadequate given the structure and orientation of the existing legal profession, making access to legal representation extremely costly and beyond the reach of the majority of the population. This is particularly the case where the existing institution of legal aid is under-funded and of limited effectiveness.

C. Will equal rights ensure equal opportunity?

Assuming the achievement of equal treatment through the guarantee of equal rights in both public and private institutions, will all South Africans be ensured equal opportunities?

Even if we limit the concept of equal treatment to the right to be treated as an equal and not as a right to an equal

distribution of some opportunity or resource or burden,[4] equal opportunity remains elusive. Given a history of colonialism and apartheid it is reasonable to assume that even after the lifting of formal discriminatory barriers socially-caused inequality will continue to deny equal opportunity. The provision of educational, social and economic advantages to the white minority and even differentially among the oppressed communities creates a continuing inequality in the capacity of individuals to make use of available opportunities or to compete for available positions.[5]

D. Will anti-discrimination provisions secure equality?

Both the Freedom Charter and the Constitutional Guidelines provide for measures designed to eradicate discrimination. The Freedom Charter mandates the removal of legal discrimination and provides for the criminalization of the preaching and practice of discrimination based on racial or national origin, while the Constitutional Guidelines place a constitutional duty on the state to eradicate race discrimination in all its forms. In addition the Guidelines criminalize the advocacy of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred.

Although the criminalization of these specific forms of discrimination provides strong measures designed to discourage

---

[4] R. Dworkin, **Taking Rights Seriously** 227 (1977).

[5] Nagel, Equal Treatment and Compensatory Discrimination, in **Equality and Preferential Treatment** (M. Cohen, T. Nagel & T. Scanlon ed. 1977) at 4.

explicit exhibition of racial prejudice they may be subject to criticism on two grounds. First, there will be those who argue that despite the history of apartheid, criminalization of even specific forms of speech is an unacceptable violation of freedom of speech. Second, despite the necessity of anti-discrimination measures, there is a valid argument that an emphasis upon anti-discrimination, with its implied defendant/victim dichotomy does not adequately address issues of equality.

Criminalization of racist speech may however be justified on two grounds. First, given a history of formal, legalized racial domination, the need to build inter-racial tolerance and acceptance is a compelling state interest, justifying restrictions on free speech. Even limited incidents of racist speech will serve to undermine the building of a non-racial South Africa in which racial equality is more then a formal declaration.

Second, an analogy can be made to the recent proscription of certain forms of language and behavior at some United States University campuses. At Emory University, for example, the authorities banned "discriminatory harassment," defined as conduct (oral, written, graphic or physical) directed against any person or group which has the purpose or reasonably foreseeable effect of creating an offensive, demeaning, intimidating, or hostile environment. Criticized by free speech absolutists the university pointed to the exceptions to the guarantee of free speech recognised by the United States Supreme Court, which

include: language posing a "clear and present danger," libel, some forms of obscenity, the use of children in producing pornography and "fighting words." Within this framework free speech and freedom from harassment co-exist, not for the purpose of curbing free speech but with the intent of making it more probable. As university president James Laney argued, "people do not feel free to speak when they are bullied -- when the message they hear is not 'I disagree with you' but 'I wish you didn't exist'."[6]

The limitations of Anti-discrimination measures become evident however when an analysis is made of how such measures will operate and their potential effectiveness in achieving the goal of equality in a new South Africa. Anti-discrimination measures aim to ensure equal treatment and may include three specific mechanisms including criminalization, civil causes of action and the establishment of either an ombudsman or some other governmentally established administrative agency such as the Equal Employment Opportunity Commission in the United States.

Criminal sanctions will provide the strongest deterrent to discriminatory practices, however these are only likely to be effective in combatting situations in which there is a pervasive pattern of discrimination providing the necessary evidence to secure a criminal conviction. In cases of individual discrimination the problem of obtaining sufficient evidence to

---

[6] J. T Laney, Why Tolerate Campus Bigots? N.Y. Times, Apr. 6, 1990, at A15, col. 2.

prove discrimination "beyond a reasonable doubt," including the element of mens rea, will make convictions, particularly in cases of more subtle discrimination, difficult. When we add the cost -- in time and resources -- of a criminal trial, these difficulties are likely to lessen the effectiveness of relying on criminal sanctions alone.

Although the burden of proof in civil cases -- the balance of probabilities -- is less than in criminal actions, the cost to the individual in bringing the case, both financially if they loose -- making them liable for both their own and the defendant's legal fees -- and in terms of the time commitment required in bringing a civil action, will tend to deter victims of discrimination from suing. However these limitations may be minimalized through the use of small-claims court procedures or other localized tribunals such as people's courts. The problems which are likely to arise with this option will revolve around the limited geographical and punitive jurisdiction usually available to localized tribunals. The likely inequality in resources between the most probable plaintiffs and defendants in civil anti-discrimination cases, affecting access to legal representation in particular, will further lessen the effectiveness of this mechanism.

The option of an ombudsman or government agency with the resources and commitment to follow-up individual complaints of discrimination in employment, education, civil service and other institutional settings will resolve many of the problems faced by

individual-orientated anti-discrimination strategies. Granted resources to establish full-time investigative and adjudicatory branches this form of institution would have the capacity to institute proceedings on the basis of complaints filed by individuals, communities and institutions. An institution of this nature would also have the ability to respond to the needs of victims of discrimination in even the most remote areas of the country, particularly if victims are able to lodge initial complaints by post or free telephone service.

Implementation of anti-discrimination legislation will be most effective however if secured through a combination of the above mechanisms -- criminal actions, civil suits and governmental agency -- for while a government supported commission or administrative unit will be most effective in responding to and investigating victims complaints, criminal and civil actions in the more egregious cases are likely to have the greatest deterrent effect.

It remains important, however, to distinguish between anti-discrimination legislation which aims to secure equal treatment and the wider problem of ensuring genuine equality among South Africa's citizens. If we adopt a discriminatory impact approach, analogous to the provision of Title VII of the 1964 Civil Rights Act in the United States which proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation, it may be possible to use the anti-discrimination framework to attack unequal access to particular

jobs, educational positions etc.

However, given the existing historically created inequalities, applying a rule which makes a statistical comparison "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs"[7] will only benefit the small proportion of people who despite their qualifications have been excluded from particular positions. Addressing these historical inequalities will require a broader approach then that encompassed by traditional anti-discrimination measures.

E. Will discrimination continue to pervade private, non-state related, social discourse?

Constitutional provisions prohibiting state related discrimination will reverse South Africa's history of legal and state sponsored discrimination but will fail to address the invidious system of social discrimination and segregation that pervades South African society. Only affirmative provisions such as those included in the Constitutional Guidelines which place a duty on the state "to eradicate race discrimination in all its forms" and "to take active steps to eradicate speedily, the economic and social inequalities produced by racial discrimination" can ensure that "apartheid ideas and practices are not permitted to appear in old or new forms."

These provisions impose a constitutional duty on the

---

[7] Wards Cove Packing Co., Inc. v. Atonio, ___ U.S. ____, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989), 240, 241.

government to adopt a legislative programme to combat private discrimination and to take steps to address the historical inequalities created by past discrimination. Constitutional frameworks advocating only restraints on governmental power fail to recognize that the exclusion of constitutionally guaranteed affirmative rights and duties would serve only to perpetuate existing inequalities.[8]

II. Affirmative action in a future South Africa

The achievement of common citizenship and the promulgation of a non-racial constitution does not automatically guarantee a truly non-racial society in South Africa. We need only to consider the history of the United States since the end of the civil war to see that formal equality, constitutional guarantees and anti-discrimination measures alone will not be sufficient to eradicate the inequalities resulting from past and present racist practices. Faced with this reality in the United States the courts and Congress approved the use of affirmative action measures for the purpose of remedying the effects of past discrimination and segregation.

Generally, affirmative action is the conscious use of race,

---

[8] The United States Constitution is an example of a system of constitutional constraints. Within this framework the need to prevent the abuse of governmental power is often presented as the most important aspect of constitution making. However, this approach fails to recognize the power of capital and private interests generally and tends to accept existing social inequality as inevitable. This form of constitutional framework is implicit in a forthcoming publication commissioned by the Anglo-American Corporation. See, **Shaping the Future: A Citizens Guide to Constitution-making and Democratic Politics in South Africa** (4th draft Jan. 1990).

sex or national origin in an active attempt to overcome the effects of a history of discrimination.[9] The goal is to break the cycle of discrimination and to achieve equality which is real and not illusory, as United States Supreme Court Justice Blackmun stated: "In order to get beyond racism, we must first take racism into account."[10]

A. Why is equal treatment not an adequate response?

Formal equality, with its requirement of equal treatment would be sufficient if all citizens were identical -- similar in every respect except that they were distinct individuals. However, given that individuals differ in their preferences, values, tastes and more significantly in their economic and social positions, it is necessary to recognize that definitions of equality are premised on a selection of relevant criteria.[11]

In addressing issues of normative equality Plato[12] and Aristotle[13] distinguished between numerical equality, where each receives an identical amount and proportional equality which requires that each will receive the same consideration in the

---

[9] Statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Education Fund before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, Jul. 11, 1985.

[10] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

[11] Note, 82 Harv. L. R. 1067, 1163-64 (1969).

[12] Plato, **The Laws**, bk. vi, 757b-758.

[13] Aristotle, **Nicomachean ethics**, bk v. 1131 a10 - 1131 b20.

distribution decision, although numerical amounts distributed differ. The principle of numerical equality recognizes that human beings are diverse and unequal in most respects but holds that for the purposes of distributing benefits and burdens among members of society, such differences are irrelevant.

Proportional equality requires equal consideration but holds that the differences among people may require numerically different treatment. Two forms of relative inequality may be distinguished, merit and need. Making merit the relevant criteria for determining the proper allocation of burdens and benefits implies a measurement of an individual's value to society. Distribution according to need recognizes that people are different in a host of respects affecting their ability to contribute to society, but denies the relevance of most of these differences as criteria upon which to base the distribution of a society's benefits.

Distribution according to merit may take different forms, each involving a different evaluation of the specific criteria's value to society. Least acceptable is a valuation of merit based on status or immutable characteristics such as race, colour or lineage. More common is a distribution based on the promise of future performance, for example, higher civil service ranking for those holding advanced academic degrees. Distribution on the basis of past performance is another form of distribution according to merit and may include the allocation of special benefits for those who have made sacrifices for the benefit of

the society. In the South African context this could include special benefits for the families of those who have died or become disabled in the struggle against the apartheid regime and even some form of Veterans Benefit under which those individuals who have sacrificed educational and other opportunities in order to serve in Umkhonto we Sizwe receive study grants and are given priority admission into special school leaving, skills upgrading, and higher education programmes.

Adopting criteria based on need involves evaluating the consequences of proposed distributions in terms of their effectiveness in meeting the needs of the recipients.[14] Recognizing the determinative significance of the needs of recipients allows us to focus beyond individual differences and onto the social causes underlying existing inequality, which demonstrate that unequal needs today are to a large extent the result of unequal treatment in the past. Furthermore, given a history where institutions of higher learning give preferences "to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful,"[15] and where the "employment system has always relied upon such non-merit-related criteria as

---

[14] Note, 82 Harv. L. R. 1067, 1168 (1969).

[15] Regents of Univ. of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, 404 (1978) (Opinion of Blackmun, J.).

nepotism, cronyism, and the 'old boy network,'"[16] application of the traditional merit approach serves only to perpetuate existing inequalities. In similar fashion equal treatment advocates who reject affirmative action because they see it as perpetuating unequal treatment refuse to recognize that the only way unequals can be made equal is by being treated unequally.[17]

1. Why are colour-blind, sex neutral approaches inadequate?

The attraction of a colour-blind, sex neutral approach lies in the difficulty faced in trying to reconcile aspirations of universal equality with the notion of unequal treatment implicit in any comprehensive affirmative action programme. In the United States the failure to face this inconsistency left the legal justification for affirmative action stranded on notions of compensation and the limited parameters of the anti-discrimination principle. This weakness is evident in the Bakke decision which despite its rejection of the colour-blind approach justifies affirmative action "under the equal opportunity ideal as a means to achieve compensatory justice."[18]

---

[16] Julius LeVonne Chambers, Statement before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, Jul. 11, 1985, at 4.

[17] Rosenfeld, Affirmative action, justice, and equalities: a philosophical and constitutional appraisal 46 Ohio State L. J. 845, 924 (1985).

[18] Rosenfeld, Affirmative action, justice, and equalities: a philosophical and constitutional appraisal 46 Ohio State L. J. 845, 909 (1985).

This justification of affirmative action, with its reliance on the ideal of equal opportunity and notions of compensatory justice, narrows the purpose of affirmative action to the elimination of the distortions that discrimination has imposed on individual prospects. "It addresses group-regarding equalities, but only for the ultimate purpose of reestablishing individual-regarding equality of opportunity."[19] Failure to place affirmative action on a firmer footing, including constitutional recognition of the collective impact of past discrimination and justification for the application of affirmative action on a community basis, left it vulnerable to attack.

From the early 1970s affirmative action programmes in the United States began to be attacked in the courts. Preferential admissions programmes adopted without specific findings of past purposeful discrimination were the first to be challenged[20] and by the mid-1980s the Reagan administration was advocating an approach in which affirmative action would only be constitutional with respect to specific identifiable victims of discrimination and the administration committed itself to "color-blind as well as sex-neutral nondiscriminatory future hiring and promotion practices."[21]

---

[19] Id.

[20] See, G. Gunther, **Cases and Materials on Constitutional Law** 803 (1980).

[21] Testimony of W.M. Bradford Reynolds, Assistant Attorney General Civil Rights Division, before the Subcommittee on Civil and Constitutional Rights Committee on the Judiciary and the Subcommittee on Employment Opportunities Committee on Education

Ironically the notion of a color-blind constitution, first articulated in Justice Harlan's dissent to the upholding of segregation in Plessey v. Ferguson,[22] is now used to attack affirmative action on the grounds that the individuals who benefitted had never been wronged, "or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing."[23]

The underlying assumption here is that the U.S. constitution only protects against conscious, deliberate discrimination and that affirmative action is only permitted to compensate direct individual victims of discrimination with the purpose of ensuring the fair and prompt restoration of a system based on genuine equality of opportunity. The issue is whether affirmative action rests on principles requiring compensation for past harms or whether it is to be based on principles which aim at future equality of opportunity.[24]

---

and Labor, U.S. House of Representatives Affirmative Action and Equal Employment Opportunity Enforcement.

[22] Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

[23] Testimony of Bradford Reynolds, supra note 21, at 11.

[24] Goldman, Affirmative Action in **Equality and Preferential Treatment** 192 (M. Cohen, T. Nagel & T. Scanlon ed. 1977).

B. Is individual compensation for specific acts of discrimination adequate?

Reliance on individual compensation for specific acts of discrimination is an inadequate basis upon which to address the fundamental inequalities between blacks and whites which permeate virtually every aspect of South African life. In specific cases this approach requires a showing that there has been a specific intentional act of discrimination upon which the victim may base a claim of right. Apart from the difficulty of proving a conscious act of discrimination, this theory fails to address the present effects of past discrimination. Even when it recognizes discriminatory effects rather then discriminatory acts as the basis for such claims it limits the remedy to compensation for specific victims. Compensation to an individual victim of discrimination is not unlike compensation to any other victim of a tortious act and as such limits the concept of affirmative action to that of any other civil remedy -- making the individual victim whole.

At a more general level this form of affirmative action, or more correctly, compensation, seeks to preserve the structural integrity of the prevailing system of production and distribution by merely shuffling some individuals as compensation for a history of systematic depriviation of a whole sector of society.[25] Although this form of affirmative action may "require

---

[25] Rosenfeld, Affirmative action, justice, and equalities: a philosophical and constitutional appraisal 46 Ohio State L. J. 845, 924 (1985).

that a factor other than talent and effort, such as race or sex, play a role, sometimes even a decisive one,"[26] in the allocation of resources, it would only serve to further perpetuate the overall existing system of inequality.

C. Is there a legitimate claim of reverse discrimination?

Reverse discrimination has, in the United States, become the rallying cry of the attack against affirmative action programmes. Affirmative action was described by the Justice Department as "the granting of preferences, not simply to individuals who had in fact been injured, but to an entire group of individuals, based only on their race or sex," and racial preferences were condemned as "elevating the rights of groups over the rights of individuals . . . [and as such] at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant."[27]

Justification for the claim of reverse discrimination arises out of an anti-discrimination view of affirmative action which, because based on a victim/perpetrator dichotomy, views racial discrimination not as a combination of objective and subjective conditions affecting a particular social group but rather "as actions, or series of actions, inflicted on the victim by the perpetrator." Within this perpetrator perspective the focus is on what particular perpetrators are doing or have done to particular

---

[26] Rosenfeld, Affirmative action, justice, and equalities: a philosophical and constitutional appraisal, 46 Ohio State L. J. 845, 904 (1985).

[27] Testimony of Bradford Reynolds, supra note 21, at 11-12.

victims and the remedial task "is merely to neutralize the inappropriate conduct of the perpetrator."[28]

Central to this perspective is the notion of fault, reflected in the assertion that only 'intentional' discrimination violates the anti-discrimination principle, that is, conduct accompanied by a purposeful desire to produce discriminatory results. The effect of this notion is to create a class of "innocents" who feel unjustly stigmatized by having to bear the burdens -- arising from affirmative action remedies -- ordinarily imposed only upon the "guilty."

In one attempt to avoid these consequences of the reverse discrimination argument it is argued that it is not appropriate to apply a standard of heightened scrutiny when white people decide to favor black people at the expense of white people. The rationale of this argument is that "regardless of whether it is wise or unwise, it is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself."[29] This argument is however flawed in its ahistorical approach -- its failure to acknowledge that the issue being addressed by affirmative action is how to overcome the legacy left by a history of racial oppression -- which leads it to view affirmative action in terms of majority/minority and anti-

---

[28] Freeman, Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine in **Marxism and Law** 211 (P. Beirne & R. Quinney ed. 1982).

[29] Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727 (1974).

discrimination/compensation dichotomies and hence to accept the very notion of reverse discrimination.

Introduction of the Group-Disadvantaging Principle represented a means not only to overcome the notion of reverse discrimination but to attack the anti-discrimination principle itself. This theory identified criteria which once met by a particular social group justifies efforts to improve the status of the group. A special disadvantaged group would have to meet three criteria: "(a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed."[30] Redistribution in favor of such a group, it is argued, "may be rooted in a theory of compensation--blacks as a group were put in that position by others and the redistributive measures are owed to the group as a form of compensation. The debt would be viewed as owed by society, once again viewed as a collectivity."[31]

In terms of this approach concern should focus on those laws or practices that hurt disadvantaged groups and thus a distinction could be made between unequal treatment -- characterized as group-disadvantaging conduct -- which would be in violation of constitutional guarantees of equality and unequal treatment that may be unfair but not unconstitutional. "Preferential treatment in favor of one of the specially

---

[30] Fiss, Groups and the Equal Protection Clause in **Equality and Preferential Treatment** 131-32 (M. Cohen, T. Nagel, & T. Scanlon ed. 1977).

[31] Id. at 127.

disadvantaged groups would be an instance of such conduct."[32] Thus, in contrast to the anti-discrimination principle, with its individualistic, means-focused, and symmetrical character -- providing justification for claims of reverse discrimination -- the group-disadvantaging principle would justify permitting affirmative action.[33]

However, despite this seemingly neutral and sophisticated approach, the disadvantaged group notion, with its requirement that the group's political power be severely circumscribed, and its reliance on compensation to redress the disadvantage, skates by the simple conclusion that affirmative action should be mandated by the constitution's promise of equality. The very notion of equality is the antithesis of oppression, and any guarantee of equality is obliged to address itself to the continuing effects of a history of oppression, regardless of the group's present political status.

A constitution's guarantee of equality -- even if limited to the notion of equal consideration in the distribution decision -- will remain discredited if it fails to mandate action to redress the effects of past oppression. Procedurally in each case, in order to determine whether affirmative action is mandated by the constitution's guarantee of equality, we need only ask whether the particular conditions complained of, viewed in their social and historical context, are a manifestation of past or present

---

[32] Id. at 136.

[33] Id. at 148.

oppression.[34]

D. Is there a role for mandated private affirmative action?

If it is accepted that an affirmative constitutional framework -- one which includes but also goes beyond merely guaranteeing citizens rights against government abuse -- requires that constitutional guarantees of equal protection be understood to impose a duty on the state to ensure genuine equality of opportunity among its citizens, then it will be possible to envisage how affirmative action will function in a democratic South Africa.

In this framework, not only will the state be required to provide resources to address the continuing effects of a history of oppression, but it will be required to act -- through the passage of legislation and state programmes -- to ensure that these same effects are not perpetuated in any sector of society. Private institutions and businesses would to this extent be required to play a role in reducing inequality through the adoption of affirmative action programmes within their spheres of activity. Preferential advancement, hiring or admission programmes would in this context ensure that the continuing effects of past oppression are eradicated in an organized and thoroughgoing manner. A decision, for example, to hire a

---

[34] Freeman, Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine in **Marxism and Law** 217 (P. Beirne & R. Quinney ed. 1982).

qualified black women over an even more highly qualified white man, will in this context not be an act of individual compensation or reverse discrimination, but rather an affirmative act mandated by the constitutional guarantee of equal rights to ensure that all South Africans, and in particular those communities who continue to suffer the effects of past oppression, enjoy equal participation in the society.

E. Affirmative action as a means to achieve the goal of equal participation in society?

The goal of equal participation is to end white supremacy and black inequality in all its manifestations,[35] to achieve "genuine equality" among all citizens in a non-racial South Africa. A democratic South Africa will, as a society, have an interest in bringing about the equal participation of the formerly oppressed in all aspects of South African life. Only once equal participation is achieved will we get the consequences of a social history of racism behind us, once and for all, ending the existence of "two societies, black and white, separate and unequal."[36]

Justification for invoking the equal participation objective lies in the social and legal history of racism which will for a period of time continue to produce consequences for blacks as a group, denying full equal participation in society, particularly

---

[35] See, Sedler, Racial preference and the Constitution: the societal interest in the equal participation objective, 26 Wayne L. Rev. 1227, 1236 (1980).

[36] See, Id. at 1258.

in the realm of economic activity, and thus perpetuating racial inequality.[37]

The focus then, is on the present and future consequences of past discrimination. If in time no consequences remained, despite past discrimination, then there would be no further basis for invoking the equal participation principle. Take, for example Asian-Americans who have been subjected to discrimination that can be characterized as 'racial,' but who as a section of society "also appear to have a "fair share" of societal power and participation in relation to their representation among the general population."[38] In this case individual Asian-Americans continue to have a right to compensation arising out of individual cases of discrimination that violate anti-discrimination legislation, however, affirmative action based preferences for Asian-Americans cannot be justified as necessary to advance the goal of equal participation.[39]

The equal participation theory enables us to distinguish between individual acts of discrimination which will always give rise to a claim for compensation by the injured party, and affirmative action programmes which are aimed at redressing the history of racial oppression upon which a non-racial society is to be built. This approach also provides guidelines, in the notion of equal participation in relation to representation among

---

[37] See, id., at 1239.

[38] Id. at 1239.

[39] Id.

the general population, as to the required extent and duration of affirmative action in building a new South Africa.

III. What mechanisms will need to be established to implement affirmative action and anti-discrimination legislation?

It is necessary in considering the implementation of anti-racist mechanisms to distinguish between the need to provide protections against discrimination and the need to provide affirmative mechanisms through which to achieve the goal of equal participation in society.

Anti-discrimination measures may be implemented through a combination of criminal, civil and administrative mechanisms, designed respectively to: deter violations of anti-discrimination legislation or constitutional provisions; compensate victims of specific acts of discrimination; and provide cheap and efficient means of pursuing cases of discrimination in situations where the victims do not have easy access to the judicial process.

The promotion of affirmative action programmes however will require a greater commitment of state resources and oversight. In extending affirmative action "to every aspect of South African society,"[40] it would be inadequate to rely on either the good will of the existing government institutions or private sector, or to rely on the courts as an arena in which to bring actions against those who fail to conscientiously promote legislatively

---

[40] Sachs, Towards a Bill of Rights for a Democratic South Africa, 12 Hastings Int'l & Comp. L. Rev. 289, 307 (1989).

or constitutionally mandated affirmative action policies.

A. Will there be a need to establish special bodies to implement affirmative action policies?

Given the present structure of South African society, and particularly the civil service and other organs of state power, it is clear that existing institutions, "themselves built on inequality and injustice cannot be expected to be the guardians of justice and equality for others."[41] Furthermore, the creation of specific government structures is mandated by the need to ensure that affirmative action is pursued with the vigor, and to the extent, required to address the fundamental inequalities resulting from three centuries of racial oppression.

A proposal for the type of suitable administrative bodies that could be established has already been made by Albie Sachs, who argued that the "kind of body that might provide a bridge between popular sovereignty on the one hand, and the application of highly qualified professional and technical criteria on the other, would be one similar to the Public Service Commission. A carefully chosen Public Service Commission with a wide brief, highly technical competence and general answerability to Parliament, could well be the body to supervise affirmative action in the public service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action in areas of social and economic life. Finally, an Army and Security Commission could ensure that the army,

---

[41] Id.

police force, and prison service were rapidly transformed so as to make them democratic in composition and functioning."[42]

Of these the Social and Economic Rights Commission could have multiple functions, including: (1) the promotion and administration of actual affirmative rights programmes -- such as pre-school preparation programmes; (2) an oversight role with respect to educational institutions -- including admission programmes, school desegregation etc -- and in relation to programmes aimed at securing greater participation in the private sector -- in training, employment and advancement; and (3) a limited adjudicatory function aimed at resolving conflicts surrounding the implementation of these programmes. Due to the extensive nature of these functions it may be necessary to consider attaching sub-units of such a Commission to the various government departments, however it will remain necessary to retain a central body with overall responsibility to ensure a truly massive affirmative action programme.

B. What role is there for the judiciary in interpreting the constitutional and legislative regime of affirmative action?

The constitutional enshrinement of affirmative action in the Constitutional Guidelines raises the issue of who is to be the final arbiter in determining the scope and nature of affirmative action programmes in a democratic South Africa. As Albie Sachs has argued with respect to a Bill of Rights in general, the

---

[42] Id. at 308.

present Supreme Court of South Africa is ill-equipped to "give people the necessary confidence in Parliament and representative institutions, to make them feel that their vote really counts and that parliamentary democracy serves their interests."[43]

With this in mind it may be useful to consider a restructuring of the Supreme Court so as to provide for the needs of both the existing legal framework of highly technical decisions in civil cases involving contract disputes within the private sector, and the need to create a body, representative of the social interests of a future non-racial South Africa which will have the confidence of the people in its interpretation of the protections and duties incorporated in a new constitution.

While separately constituted supreme courts might deal with civil and criminal matters, a third, constitutional court, could be established through a process involving some form of democratic participation so that it retains the support of the majority of South Africans. Members of the Supreme Constitutional Court may be appointed or elected by different interest groups, including trade unions, political parties, and/or by popular election for specific terms of office, or periodic confirmation.

Such a supreme constitutional court may have jurisdiction over all constitutional issues, including claims and conflicts made on the basis of the constitution's affirmative action provisions. The power of judicial review with respect to parliament's adherence to the constitution in the promulgation

---

[43] Id. at 307-08.

and implementation of legislation would also come before this court. Eligibility for appointment may require some degree of legal experience however, it may be possible to require only that the court be supported by teams of lawyers assigned separately to, under the control of, and appointed by each member. This approach may be justified on the grounds that despite the legal technicalities involved in the development of the legal form with respect to the decisions, constitutional decisions themselves are fundamentally based on decisions balancing the needs of the society over time and the providing of consistent justice to the parties involved.

IV. Conclusion

Although this is merely a preliminary examination of the issues that may arise in relation to affirmative action proposals, it is clear that affirmative action may provide an important mechanism through which to attack the fundamental inequalities which will continue to exist with the emergence of a democratic South Africa.

Further research however requires the identification of particular areas of concern which may then be subjected to more through examination. Hopefully the above will prove useful as one basis upon which to identify such areas.